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(2)

DB(Cri)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR : M.P.

Criminal Appeal No. 558 /98

APPELLANT : Anil Mishra, son of Brahmadeo, aged about 28 years, student resident of Namana Kalan, Ambikapur, P.S. Ambikapur, District Sarguja, M.P.

[In Jail]

Vs.

RESPONDENT : The State of M.P.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE.

3891
2.3.98
Filed on.....
By Shri Arjun Banerjee
.....Advocate

Rs. A.R.

(58)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.558/1998

Anil Mishra

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Criminal Appeal No.779/1998

Vinay Singh

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge

11-9-2006

HON'BLE MR. JUSTICE V.K. SHRIVASTAVA

Agree.

Sd/-
V.K. Shrivatava
Judge

POST FOR JUDGMENT ON 15TH SEPTEMBER, 2006

Sd/-
L.C.BHADOO
Judge

14-9-2006

(39)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.558/1998

Anil Mishra

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Criminal Appeal No.779/1998

Vinay Singh

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Present: -

Mr. Govind Ram Mirri, Adv. with Mr. Ratan Pusty, Adv.:		For appellant in Cr. Appeal No.558/1998.
Mr. M.K. Baig, Advocate	:	For appellant in Cr. Appeal No.779/1998
Mr. U.N.S. Deo, Addl. Public Prosecutor with Mr. D.K. Gwalre, Dy. Govt. Advocate	:	For the State/respondent.

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND

HON'BLE MR. V.K. SHRIVASTAVA, JJ.

J U D G M E N T

(Delivered on 15th September, 2006)

The following judgment of the Court was delivered by *L.C. Bhadoo, J.*-

1. Criminal Appeal No.558/98 filed by appellant Anil Mishra and Criminal Appeal No.779/98 filed by appellant Vinay Singh are being disposed of by this common judgment, as both these appeals are arising out of the same judgment passed in Sessions Trial No.419/95 relating to the same incident.

2. These appeals are directed against the judgment of conviction and order of sentence dated 3rd February, 1998 passed by learned 1st Additional Sessions Judge, Ambikapur, District Sarguja in Sessions Trial No.419/95 whereby learned Additional

Sessions Judge after holding the accused/appellants guilty for commission of offence under Sections 363, 366 & 376 (2) (g) of the Indian Penal Code, sentenced each of the accused/appellant to undergo R.I. for 7 years, R.I. for 7 years and imprisonment for life respectively. Learned Additional Sessions Judge directed that all the sentences shall run concurrently.

3. The case of prosecution, in brief, is that in the night of 13.8.95 the prosecutrix along with her family members i.e. her father, mother, grandfather and two sisters was sleeping in her house situated at Nehru Ward, Ambikapur. At about 23.30 hrs in the night the accused persons knocked the door for opening the same, but the mother of prosecutrix did not open the door. However, after sometime younger sister of prosecutrix wanted to answer the call of nature, therefore, when the mother of prosecutrix opened the door in order to take her daughter outside the house for answering the call of nature, the accused persons forcibly entered the house and bolted the doors from inside. Accused persons started assaulting her mother & father and thereafter committed rape on her mother. They forcibly took the prosecutrix and her sister 'S' out of the house and at the distance of about 10 steps from her house, they threw her on the ground and committed rape on her after removing her clothes. Her sister 'S' was seeing the act of accused persons. Thereafter, they took her and her sister 'S' in a house situated at Gangapur, they brought the key from the landlady and took them in a room and there also they committed rape on her twice. When about 3.00 a.m. both the accused persons went for sleep, she alongwith her sister 'S' ran away from there. Report of the incident was lodged by the prosecutrix 'V' in the Police Station Ambikapur on 14.8.1995 at 7.50 a.m. On receiving the report, the Station House Officer, Police Station Ambikapur registered F.I.R. (Ex. P-8) for commission of offence under Sections 363, 376 (2)(g) & 366 r/w Section 34 of the Indian Penal Code and took up the investigation.

4. Accused Vinay Singh & Anil Mishra were sent to the Government Hospital Ambikapur for medical examination regarding their competency to have sexual intercourse where they were examined by Dr. B.S. Sengar (PW-5), who after examination prepared the report Ex.P-1 & Ex.P-2 respectively and opined that both the accused persons are competent to have sexual intercourse.

5. The prosecutrix 'V' was also sent for medical examination to Assistant Surgeon (Female) to the Government Hospital, Ambikapur where Dr. Pratibha Rajul Jain (PW-5) examined the prosecutrix and prepared the report Ex.P-9. She noticed three linear abrasions over right breast in the size of 2 to 3 cm x 0.1cm, there was laceration in the vagina at 5° clock, 6° clock & 7° clock position. Laceration area was congested. Bleeding & tenderness on touch was present. Clothes of the prosecutrix and accused persons were taken into possession.

6. After completion of investigation, charge sheet was filed against the accused/appellants in the Court of learned Chief Judicial Magistrate, Ambikapur, who in turn committed the case to learned Sessions Judge, Ambikapur from where learned 1st Additional Sessions Judge, Ambikapur received the case on transfer for trial.

7. The prosecution in order to establish the charge against the accused/appellants examined 6 witnesses. On the other hand, learned Additional Sessions Judge recorded the statement of accused/appellants under Section 313 of the Cr.P.C. in which they denied the material appearing against them in the prosecution evidence and stated that they are innocent and have been falsely implicated in the crime.

8. Learned Additional Sessions Judge after hearing the arguments of learned counsel for respective parties, convicted & sentenced the accused/appellants in the manner as mentioned in Para-1 of this judgment.

9. We have heard Mr. Govind Ram Mirri with Mr. Ratan Pusty, learned counsel for appellant-Anil Mishra, Mr. M.K. Baig, learned counsel for accused-Vinay Singh and Mr. U.N.S. Deo, Addl. Public Prosecutor with Mr. D.K. Gwalre, Dy. G.A. on behalf of the State/respondent.

10. Learned counsel for the accused/appellants argued that in this case the statement of independent witness i.e. the landlady, who saw the accused persons committing rape on the prosecutrix 'V' was not recorded by the Investigating Officer, whereas, in the FIR it has been mentioned that in Gangapur the said landlady also came and saw the offence. Moreover, the sister of prosecutrix namely 'S', who was minor at the time of incident and said to be kidnapped by the accused persons, has not been examined, therefore, the conviction of the accused persons under Section 363 of IPC is bad in law. They further argued that as per cross-examination of prosecutrix, a person was residing in the neighbourhood and at some distance in the vicinity other persons were also residing, but the investigating Officer did not examine them. They also argued that as the prosecutrix is the woman of easy virtue, the evidence of the prosecutrix cannot be believed and the accused persons have been falsely implicated in the crime. They have also invited attention of the Court about some contradictions between the statement of prosecutrix before the police authorities and court evidence of the prosecutrix.

11. Having heard learned counsel for the accused/appellants, we have perused the evidence and records of the trial court. As far as the argument regarding non-examination of independent witness and without corroboration of the evidence of the prosecutrix by the independent witness, same cannot be relied upon is concerned, the law on this point is well settled by catena of judgments of the Hon'ble Apex Court that the victim of sexual assault cannot be treated as accomplice and therefore, her evidence does not require corroboration from any other evidence including the evidence of a doctor and if in a given case even if

the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. The prosecutrix is a competent witness as per provisions of Section 118, therefore, her evidence must receive the same weight as is attached to an injured in cases of physical violence and same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. However, the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this factor in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Indian Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. However, in a case, if for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence, which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. The conviction can be based on the sole testimony of the prosecutrix, if the evidence of the prosecutrix inspires confidence and does not suffer from any infirmity and untrustworthiness. When the totality of circumstances appearing on the record of the case discloses that the prosecutrix does not have strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. The Indian woman has tendency to conceal such offence because it involves her prestige as well as prestige of her family. It is common knowledge that large number of criminal cases against women remains unreported to the police on account of fear that reporting a matter to the police not only damages the reputation of the prosecutrix, but shall destroy the whole reputation of her family in the eyes of society.

12. Now we shall examine the evidence available on record in the light of the above principles laid down by the Hon'ble Apex Court. The prosecutrix 'V' (PW-3) has categorically stated in her evidence that the accused persons forcibly entered the house, bolted the doors from inside, accused Anil Mishra committed rape on her mother and thereafter, accused Vinay Singh took her in a room and committed rape on her. Thereafter, both the accused persons forcibly took her and her sister 'S' outside the house and at some distance under a tree both the accused persons committed rape on her after undressing her. Thereafter, they took them to Gangapur, where in a room the accused persons again committed rape on her. The above evidence of the prosecutrix stands corroborated by the medical evidence of Dr. Pratibha Rajul Jain (PW-5), who has stated in her evidence that there were abrasions on the chest of prosecutrix in the size of 2 to 3 cm to 0.1cm, there was laceration in the vagina in at 5° clock, 6° clock & 7° clock position, same was congested and on touch there was bleeding & tenderness. Prosecutrix was a married woman even though there were fresh lacerations in her vagina and on touch there was bleeding, which suggests that the accused persons ravished her continuously and therefore, lacerations were developed and bleeding was there and even there were abrasions on the chest of prosecutrix. As such, the evidence of prosecutrix stands corroborated by the medical evidence. Moreover, in the cross-examination of the prosecutrix nothing has come on record that she or her family members have falsely implicated the accused persons on account of any animosity or at the behest of any other person in order wreck the vengeance. There was no reason before the prosecutrix to implicate the accused persons in a false case that too at the stake of her reputation and reputation of her family. Therefore, non-production of the landlady is not fatal, as the offence stands proved by the evidence of prosecutrix and medical evidence. As far as non-production of any neighbourer is concerned, in para-10 of cross-examination, the prosecutrix has categorically stated that her screams were not heard by anyone, therefore, there is

no question of production of any neighbourer. Accordingly, we do not find any substance in the argument advanced by learned counsel for the accused/appellants that no independent witness has been examined.

13. As far as the point argued by learned counsel for the accused/appellants that the prosecutrix is the woman of easy virtue is concerned, in the first instance, in Para-14 of the cross examination, the prosecutrix herself has admitted that she is not in the habit of having physical relations with other persons and but there is nothing on record which goes to show that she was a lady of easy virtue, even otherwise a woman of easy virtue has also a right to protect her person and her evidence cannot be discarded and has to be cautiously appreciated. In the matter of **State of Maharashtra and another Versus Madhukar Narayan Mardikar** reported in **(1991) 1 Supreme Court Cases 57**, in Para-8 the Hon'ble Apex Court held that:

> "…. Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to protection of law. Therefore, merely because she is a woman of easy virtue, her evidence cannot be thrown overboard. At the most the office called upon to evaluate her evidence would be required to administer caution unto himself before accepting her evidence…."

Therefore, there is no reason before us to disbelieve the evidence of the prosecutrix 'V' and also for the reason, as mentioned earlier, that the defence has not been able to elicit in the cross examination that a false case has been foisted upon the accused persons.

14. During the arguments learned counsel for the accused/appellants tried to impress upon the Court that there are certain contradictions between the police statement and in the court evidence of prosecutrix, we have also noticed these contradictions, but the same are insignificant discrepancies,

which in normal course occurs in the natural evidence. These discrepancies are not of such a nature, which creates doubt about the happening of the incident looking to the totality of circumstances and evidence available on record.

15. Therefore, from the evidence available on record it is established that the accused/appellants in order to commit rape on the prosecutrix 'V' abducted her and thereafter committed gang rape on her, as such, they have been rightly convicted under Sections 366 & 376 (2)(g) of the IPC and to this extent, we do not find any illegality or infirmity in the finding of the trial court. However, as far as the conviction of accused/appellants under Section 363 of IPC for kidnapping a minor girl from the custody of her parents is concerned, in this case the prosecution has not examined the said minor girl 'S' in order to prove the charge against accused/appellant that they kidnapped 'S' and it is not the case that she was not available. Therefore, the conviction of accused/appellants under Section 363 of IPC cannot be sustained.

16. Learned counsel for the accused/appellants argued that at the time of commission of crime accused Anil Mishra was student and accused Vinay Singh was working as Driver, there is nothing on record to show that they are habitual in committing such offence and they are in detention since 18.8.1995, thereby they are in detention for more than 11 years, as such they be released for the sentence already undergone and for that purpose learned counsel for the accused/appellants relied upon the decision of Jharkhand High Court reported in **2004 Cri. L.J. 3375** between **Sangi Hambram and others Versus State of Bihar (now Jharkhand)**, in which five accused persons committed rape twice when the prosecutrix was sleeping in her house. Accused entered and ravished the prosecutrix in such a manner that she was unable to wear her clothes and walk. The Court considering that the accused persons are in age group of 22-29 years and there was nothing on record to show that they committed similar type

of gang rape, they were let off for the sentence already undergone about 11 years. Learned counsel also relied upon the judgment of Hon'ble Apex Court in the matter of **State of C.G. Vs. Lekhram** reported in **2006 Cri.L.J. 2139** (Supreme Court) in which rape was committed on the minor girl and sentence was reduced to 1½ years already undergone.

17. In this case also at the time of commission of crime accused Anil Mishra was aged about 25 years and accused Vinay Singh was also aged about 25 years and there is nothing on record to show that they are in the habit of committing such type of offence. They are in custody for last more than 11 years, therefore, we are of the considered opinion that the ends of justice would meet if they are released for the sentence already undergone.

18. In the result, the appeals of accused/appellants ~~are~~ partly succeed, the conviction & sentence imposed on them for commission of offence under Section 363 of IPC are set aside, while maintaining their conviction under Sections 366 & 376 (2)(g) of IPC. The sentence for life imprisonment imposed on the accused/appellants under Section 376 (2)(g) is reduced to sentence already undergone i.e. 11 years and 29 days. The sentence imposed on the accused/appellants in Sessions Trial No.418/95, which has been reduced to already undergone sentence i.e. more than 11 years in Criminal Appeal Nos.556/98 & 818/98 are directed to run concurrently with the sentence imposed in the Sessions Trial No.419/95, which has been reduced in these appeals. The accused/appellants be set at liberty forthwith, if not required in any other case.

Sd/-
L.C.BHADOO
Judge
15-9-2006

Sd/-
V.K. Shrivatava
Judge

Roshan/-